

Senate from Virginia, despite being a resident of the District of Columbia. Where would the courts go with that?

Is it possible, is it conceivable, that a mere redrawing of a political boundary would constitute a proper loss of representation in Congress? I doubt it.

So it seems to me the nature of your deliberations are therefore foreordained. It is clear the District deserves representation. This issue should not be debated another 100 years.

Just as 100 years ago the Senate Parks Commission left a great legacy to the city with its plan to commemorate the centennial with a grand new plan for the physical heart of the city, it is time for us as we approach the 200th anniversary of our location here on the Potomac River to give us something to celebrate for the bicentennial year in the year 2000, and that could only be the full rights of citizenship which has been denied for 200 years.

Thank you very much.

### III. THE NATURE OF THE AMERICAN CONSTITUTION: IS THERE A CONSTITUTIONAL RIGHT TO VOTE AND BE REPRESENTED?

PROFESSOR SARGENTICH: Thank you very much. Today, we have a panel that it is my pleasure to introduce, a number of distinguished people to discuss and to debate the essential constitutional question here: Is there a constitutional right to vote and be represented? What are its dimensions? Where does it come from? What are its limits?

As the panel members come up, I will introduce them from your right to your left. Edward Still is the Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law. He has been an adjunct professor at the University of Alabama School of Law. He has worked in federal litigation and civil rights and employment litigation for a number of years, has argued three cases before the United States Supreme Court, and has argued dozens of other cases in Alabama and represented the plaintiffs. He has served as the chair of the Center for Voting and Democracy, and is a prolific author in this area.

Professor Gary Peller is a professor of law at Georgetown University, where he teaches, among other things, constitutional law, criminal procedure, and jurisprudence. Gary Peller clerked for Judge Lasker, in the U.S. District Court for the Southern District of New York, and has served as Co-secretary of the Conference on Critical Legal Studies. He has written a number of important works in the fields of legal theory

and legal history.

The moderator of our panel today is Professor Jeff Rosen of the George Washington University. He is also the Legal Affairs Editor of *The New Republic*, where he writes important pieces on constitutional politics. Jeff served as clerk for Chief Judge Mikva on the U.S. Court of Appeals for the District of Columbia and has published articles in a wide range of publications, including *The New Yorker*, *The New York Times*, and a number of law reviews.

Brenda Wright is the Managing Attorney of the National Voting Rights Institute in Boston, Massachusetts. Prior to joining the institute, she served as director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, where she litigated numerous voting rights cases throughout the United States. In 1997 she successfully argued the first Supreme Court case involving the Motor Voter Law, and she is the author of several law review articles in this field.

To complete the panel, James Gardner is a professor of law at Western New England College of Law, where he teaches constitutional law. Prior to teaching, he served as a trial attorney in the Civil Division of the U.S. Department of Justice and, more recently, as a cooperating attorney for the New York Civil Liberties Union. He also has published extensively on voting rights, in numerous law journals, and has a forthcoming book entitled *State Expansion of Federal Constitutional Liberties*.

A distinguished panel. I regret that I will have to leave now for class. But I take solace in the fact that this is being taped and that I and my students can observe this panel and the succeeding events carefully.

Thank you.

PROFESSOR ROSEN (MODERATOR): Thank you so much, Tom. What a pleasure it is to moderate such a distinguished panel on such an important topic: Is there a constitutional right to vote?

I was struck by the very different answers to that question that we heard even in the introductory statements. Dean Grossman and Professor Gillette both talked about the right to vote as a fundamental right of citizenship, constitutive and protective of all other rights. Surely this notion, call it the modern notion of the right to vote, is deeply embedded in our voting rights jurisprudence today.

But if we were to ask the Framers of the Fourteenth and Fifteenth Amendments, the amendments that are at the center of voting rights litigation, what they thought about the matter, they would have a very different answer.

How can I state this so confidently? Because in fact, the Framers were

asked. They were asked, and they gave us an answer. To talk about that answer, I want to tell you about the story of John Bingham and Victoria Woodhull.

John Bingham is, of course, the James Madison of Reconstruction, the framer of the Fourteenth Amendment. Victoria Woodhull, the subject of Barbara Goldsmith's fascinating new biography,<sup>41</sup> is remembered today more as a sexual radical than an advocate of political suffrage. But in fact, the two arguments were in her mind combined. Woodhull's free love ideas were based on the same philosophy of individual rights as her suffrage arguments.

She said that individuals had an inalienable right to make and dissolve sexual relationships as they desired. The right of sexual self-determination was derived from what Woodhull characterized as our theory of government based on the sovereignty of the individual, which itself included the fundamental right to vote.

Woodhull is best remembered because of her participation in a scandal that presaged the drama that is amusing us today. Woodhull exposed an adulterous affair between Henry Ward Beecher, the charismatic minister and the scion of the eminent reformer family, and his parishioner, Elizabeth Tilton.

Woodhull wrote about the affair in the *Salon* magazine of its day. The articles so inflamed respectable opinion that poor Victoria Woodhull was hounded by the Kenneth Starr of the Gilded Age, Anthony Comstock, who prosecuted her for her obscene lectures and her writings about free love, and indicted her because of her unconventional ideas.

But in 1871, just a few years before her showdown with Beecher, Victoria Woodhull presented a petition to John Bingham and the House Judiciary Committee. She argued that the right to vote was so fundamental that it was protected by the Fourteenth and Fifteenth Amendments, and therefore, she argued, women's suffrage was, in fact, constitutional before the passage of the Nineteenth Amendment.

What was Victoria Woodhull's argument to the House Judiciary Committee? First, she said, pointing to the first sentence of the Fourteenth Amendment, the right to vote is inherent in national citizenship. The first sentence of the Fourteenth Amendment declares: "All persons born or naturalized in the United States . . . are citizens of the United States." Victoria Woodhull said that U.S. citizenship included the right to vote.

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41. See BARBARA GOLDSMITH, *OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL* (1999).

Second, she said that the Fifteenth Amendment, although it seems to prohibit only discrimination because of race, also prohibits denial or abridgement of the right to vote on account of sex. Women, white and black, said Woodhull, belonged to races, although to different races. The right to vote can't be denied on account of color. Therefore, all people included in the term "color" have the right to vote unless otherwise prohibited. This was a very creative argument.

What did the House Judiciary Committee say? John Bingham, the framer of the Fourteenth Amendment told us his views, and we don't often get this kind of direct evidence in constitutional jurisprudence. No one asked James Madison what he thought the First Amendment meant. But John Bingham was presented with the Woodhull petition, and what was his response? His response was, Sorry, Miss Woodhull. I know what the Fourteenth Amendment means. I wrote it, and you lose. Why? I have got a lot of arguments, said Bingham, and they are based on text, history, and structure. This is an easy question.

Why was it obvious to the Committee on Reconstruction that women were not guaranteed the right to vote by the Fourteenth Amendment? First, said Bingham, the Fourteenth Amendment merely granted federal protection for privileges or immunities already guaranteed by Article IV. It didn't create or transform the relationship between the state and federal governments. It merely guaranteed enforcement for these preexisting privileges or immunities.

Why was it obvious to everyone during the Reconstruction Era that the Privileges and Immunities Clause of Article IV did not protect the right to vote? Because clearly a citizen from Massachusetts who traveled to South Carolina and asserted a right to vote in South Carolina elections based on temporary residence would be laughed out of town. It was only fundamental private law rights, such as rights of contract and property, that could be extended to all citizens and carried from state to state. These, therefore, are the fundamental privileges or immunities of citizenship. That is the first thing Bingham said.

That is an argument about history and structure. Then he made an argument about text. The second section of the Fourteenth Amendment, the section that women's suffrage advocates feared most of all, Bingham interpreted in precisely the way that they had hoped that he wouldn't.

He said the presence of the word "male" in Section 2, the fact that apportionment is reduced only when suffrage is denied to the male population, makes it clear that the Framers of the Fourteenth Amendment had no expectation that women as well as men had a fundamental preexisting right to vote. Elizabeth Cady Stanton had

feared the insertion of a term of caste, and Bingham fulfilled her fears.

So Bingham invoked text, history, structure, and also personal authority—I know what it meant; I wrote it—in rejecting Victoria Woodhull's petition.

I won't belabor the point. But the same arguments were embodied in precedent, just three years later, in *Minor v. Happersett*,<sup>42</sup> when the Supreme Court in 1874 rejected Victoria Miner's assertion of a right to vote under the Fourteenth Amendment. Chief Justice Wade rehearsed precisely these arguments.

He talked about history. When the federal constitution was adopted, all states with the exception of Rhode Island and Connecticut had constitutions of their own, and in no state were all citizens permitted to vote. Wade noted that the right to vote was restricted on the grounds of property ownership and literacy. He pointed to Section Two of the Fourteenth Amendment as pretty clear evidence that women weren't meant to be included.

Then he talked about the Republican Form of Government Clause and said that all the states had republican governments when the Constitution was adopted. In all except for New Jersey, however, the right of suffrage was only bestowed on men. Under these circumstances, he concluded it is certainly too late now to contend that a government is not republican within the meaning of the guarantee of the Constitution because women are not made voters.

So in the 1870s it was uncontroversial: Text, history, structure, and precedent all said that the right to vote is not fundamental.

Let's fast forward now to the modern era and to Professor Jamie Raskin's fascinating paper that we will all have the chance to read and discuss. It's hard not to be struck by the difference in our modern conception of voting rights. When we look at the collection of cases that Jamie Raskin has collected, we just find statements that express this drastically different view.

*Wesberry v. Sanders*.<sup>43</sup>

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classifications of people in a way that unnecessarily abridges this right.<sup>44</sup>

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42. 88 U.S. 162 (1874).

43. 376 U.S. 1 (1964).

44. *Id.* at 17-18.

*Evans v. Cornman*,<sup>45</sup> a case on which Professor Raskin puts great emphasis, struck down the state of Maryland's disenfranchisement of American citizens living on the grounds of the National Institutes of Health, a federal enclave. The Court held that by disenfranchising these citizens, Maryland was breaking the "citizen's link to his laws and government, [that] is protective of all fundamental rights and privileges."<sup>46</sup>

Then, of course, there is *Reynolds v. Sims*,<sup>47</sup> the most famous of all voting rights cases, the case that Chief Justice Warren considered the most important of his chief justiceship, which says: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments, can only mean one thing—one person, one vote."<sup>48</sup>

That is an incredibly suggestive sentence, isn't it? It suggests that far from being a positive law right, created by the Constitution, perhaps the right to vote is a preexisting natural right declared by the Constitution but not created by it.

This in fact was the argument of Victoria Woodhull, the women's suffrage advocates, and the most radical Reconstruction Republicans, such as Charles Sumner. Sumner insisted that the right to vote was a natural right constitutive of other rights. Many of the women's suffrage advocates felt similarly.

You have here today a distinguished panel, a group that could not be better prepared to answer the question that I will take the liberty of setting for them. They, of course, will feel free to redefine the question and tell me why this is the wrong question to ask.

I am struck by the dramatic evolution from the nineteenth-century vision, when it was pretty obvious to everyone that the right to vote was not constitutionally fundamental, and the modern vision in which we have a very different view.

And I'd like our panelists today to help us trace that evolution and make some sense out of this fascinating change. We are going to go proceed in alphabetical order, and I will begin by asking Professor Gardner to start.

PROFESSOR GARDNER: Thanks very much. I think the story that Professor Rosen starts with is a good one because it shows something that has been with us from the very beginning—a disjunction between the popular understanding of voting and democracy and the official

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45. 398 U.S. 419 (1970).

46. See *id.* at 422.

47. 377 U.S. 533 (1964).

48. *Id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

legal structure that has been implemented, particularly in the Constitution. You can go back even further—the Electoral College, for example. The theory of the Electoral College was that people were supposed to vote for wise individuals who would then deliberate among themselves and choose a President. It didn't work that way from day one. Nobody would vote for electors unless they knew whom those electors were going to support for President. So clearly, the people of this country have always felt entitled to a good deal more direct democratic control than the Constitution has provided them.

I first want to break down the question that this panel has been asked to address: Is there a constitutional right to vote? It is very broad and covers an unmanageable amount of ground. The Supreme Court has an extensive voting rights jurisprudence, as you know, and it is exceptionally confusing. I don't know of any other area of constitutional law where the Court has said such contradictory things. It has said, for example, that the Constitution undeniably protects the right to vote in state and federal elections.<sup>49</sup> It has said that the right to vote is the most fundamental of all rights because it is preservative of all others.<sup>50</sup> At the same time, it has also said—and in contemporaneous cases—that the Constitution does not confer the right of suffrage upon anyone,<sup>51</sup> and that the right to vote is not a constitutionally protected right.<sup>52</sup> Well, which is it?

One way to manage this contradiction is to refine the question a little bit. The right to vote covers at least four broad categories of questions. I want to just lay them out for you in what I take to be their order of logical priority. The first question is: Must an office even be filled by election? That is, can an office be appointive or must it be filled by election? That is a question that gets to the scope of democratic self-government itself. The second question is: If an office is filled by election, who can cast a ballot? That is the question of the extension of suffrage. A third question that often arises is: If there is an election and people can cast ballots, for whom may they cast those ballots? That is usually couched as an issue of ballot access. The fourth question is: When there is an election, how do the votes have to be counted and weighed? That is usually considered to be a question of vote dilution or the one person, one vote standard.

As we go from the more logically prior questions to the more subsidiary questions, the Court has actually had a lot more to say. It has

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49. See *Reynolds*, 377 U.S. at 554.

50. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

51. See *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

52. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

had very little to say about the more fundamental and logically prior questions. What that means is that the Court has been addressing the more specific and subsidiary questions without any kind of developed background, principle, theory or philosophy that could guide it. That, I think, accounts for a lot of the confusion.

When we are talking about the District of Columbia and the right to vote, we are talking about the first two kinds of questions that I mentioned. The first question is whether District residents can vote for Congress. That is a question of the extension of the franchise. Then there is another question, which is whether D.C. residents are entitled to an elective sub-national legislature, whether it is the D.C. Council or whether it is Congress acting in some kind of discrete local capacity. So those are questions that fall into these more general, more fundamental areas where the Court has given much less guidance than in some other areas.

Let me lay out for you what I take to be the Court's current position on these two questions, and I'll take them in reverse order. First, does the U.S. Constitution grant individuals a right to an elective sub-national legislature, like a state legislature? I think the Court's answer here is yes and no. There is only one clause of the U.S. Constitution that really deals with this directly, and that is the Guarantee Clause, which guarantees to the states a republican form of government.<sup>53</sup> Certainly the notion of a republican form of government seems to contemplate an elective legislature. But the Court has held that all Guarantee Clause issues are non-justiciable because they raise political questions.<sup>54</sup> So if there is any right to an elective state legislature, it is not judicially enforceable.

The second question is: Does the U.S. Constitution grant individuals a right to cast ballots in federal elections? Again, I think where the Court is right now is yes and no. The Constitution says that representatives and senators must be elected. But by whom? The Court has consistently refused to hold that the U.S. Constitution grants anyone a substantive right to vote, which is to say there is nobody in the country who can simply present themselves and say without more, "I am entitled to vote for Congress."

It is useful here to compare the U.S. Constitution to the various state constitutions. The state constitutions clearly do, every one of them, grant a substantive right to vote. The documents set out qualifications for electors, and if you meet those qualifications, then you have a right

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53. See U.S. CONST. art. IV, § 4.

54. See *Luther v. Bordeau*, 48 U.S. 1, 46-47 (1849).



to vote in those state elections. The U.S. Constitution has a completely different structure, which is the result of—as so many things on important issues were—a compromise. The U.S. Constitution doesn't set out qualifications for voters in federal elections. What it does is incorporate by reference whatever qualifications the states have chosen to grant to their own citizens.

Now that is a bizarre structure. That structure has led the U.S. Supreme Court to a bizarre place, I think, which is this: The Court has treated the right to vote only as a relative right under the Equal Protection Clause. So what they say is, if and to the extent that a state chooses to grant to its own people the right to vote for its own state legislature, then to that extent and no further do the people of that state also have a right to vote for members of Congress. Furthermore, the extension of the franchise under those circumstances has to pass strict scrutiny under the Equal Protection Clause because the Court treats the right to vote as a fundamental right for equal protection purposes. That is where I think the Court is.

Let me say very briefly why I think the Court's answers to these questions really stink. I'll start doctrinally. Doctrinally, the Court has created just enormous confusion by these conflicting pronouncements.

Secondly, it seems to me that denying that the U.S. Constitution grants a substantive right to vote to people has got to be wrong. I think the Court on some level understands that and feels very skittish about it. Why else would they have made this end run and created this strange anomaly of a right which is so fundamental that it cannot be abridged except consistent with strict scrutiny, yet it receives no direct substantive protection under the Constitution? It is a kind of a "springing fundamental right." When you have something like that, it seems to me, that is a sign of a problem.

The problem, I think, is on a deeper level—the Court is running away from certain issues. I think that is unfortunate in this area because it seems to me that if there is anything that a constitution ought to do, it ought to set out the ground rules by which a polity conducts its own political system. It should set up a structure. For the Court to avoid articulating what that structure is, and even to fail to acknowledge that the Constitution establishes a structure like that, remands to the political process the very issues that ought to decide how the political process itself is shaped. So I think it is a bad place to be.

Can anything good be said for the Court's position? Yes. I think the best that can be said for the Court's position is that it is probably faithful to the views of the original Framers of the Constitution. That is certainly not trivial. The Framers, I think it is fair to say, did not see

voting as particularly important. They were highly suspicious of democracy. They associated it with mob rule. I think it is also fair to say they didn't think of it as an especially important safeguard of liberty. As far as they were concerned, the safeguards of liberty that they put into the Constitution were federalism and separation of powers in the first instance, and then a bill of rights that was judicially enforceable in the second instance. I am sure they thought that *direct* control—and I am saying direct control—of national officials was a nice, wise safeguard. But I don't think they viewed it as the primary line of defense. I think they viewed it as the last line of defense of the liberties that the Constitution was designed to protect.

Now as a nation, though—and this is what Professor Rosen was getting at—as a nation we have lived through a dramatic evolution in our attitude toward voting. We have gone through the Jacksonian period; we have gone through Populism; we have gone through Progressivism, all of which were movements that placed a high value on direct popular control of government.

Now the main impact of these developments has been felt mostly on the state level—expansion of suffrage, home rule, the election of multiple executive branch officials, initiative, recall, referendum. These are state-level developments. But to some extent, the same influence is felt in the federal document. There has been the constant narrowing of the permissible grounds of disenfranchisement.<sup>55</sup> There has been direct election of senators.<sup>56</sup> So that, I think, is the best that can be said for the Court's position.

I guess my problem with it ultimately is that this defense of the Court's position flows from a deep and I think misguided commitment to a very particular kind of constitutional interpretation, which is an originalism that is not only rigid but sort of willfully blind, blind to the developments in constitutional thought that have taken place since the framing.

Just to bring it home to the question of the pending lawsuit, I think that arguments that the Corporation Counsel is advancing will succeed only if the District Court is willing to engage in a kind of constitutional interpretation that the federal courts have been pretty clearly instructed from on high not to engage in.

Thanks.

PROFESSOR ROSEN: Thanks so much, Professor Gardner. Professor Peller.

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55. See, e.g., U.S. CONST. amends. XV, XIX, XXIV, XXVI.

56. See U.S. CONST. amend. XVII.

PROFESSOR PELLER: Good morning, everybody. I want to say first that I am honored to have been invited to participate in this program at the American University, Washington College of Law. As Claudio Grossman said earlier, this law school has become one of the really exciting intellectual centers in legal education today. Professor Jamie Raskin's work on voting rights in the District exemplifies the kind of fresh new perspectives that have become the hallmark of scholarship here during the last decade.

I want to offer a brief view from the Left of the legal and political grounding for the movement for voting rights in the District. I should say at the outset that, while I have some skepticism about the underlying ideological message implicit in the focus on voting rights, I do not want to be understood as criticizing Professor Raskin—upon whose work much of the debate is proceeding. In fact, in his other work, Raskin has taken positions that are very close to those that I will be articulating here. In general, Raskin's other constitutional law work has consistently emphasized a critique of the formalism of prevailing interpretations of the Constitution: for example, he has argued that it is not sufficient simply to have a formal right to vote in an election context in which wealth is the practical prerequisite to mounting a serious campaign for elective office.<sup>57</sup>

Let me begin by picking up on the idea of a "springing constitutional right" that Professor Gardner has articulated. The idea of a "springing constitutional right" arises from a series of well-known Warren Court decisions in which the Court held that the government may not provide benefits to people on a basis that discriminates against the poor—even if the government had no obligation to provide the underlying benefit in the first place. I am thinking of cases like *Griffin v. Illinois*,<sup>58</sup> in which the Court required that once a State has in place a system for appellate review of criminal convictions, it must provide indigents with free trial transcripts in order to make the appeal right meaningful—even though there is no constitutional obligation for a State to provide any appellate review of criminal convictions. Similarly, the Warren Court held in *Harper v. Virginia State Board of Elections*<sup>59</sup> that, although the Constitution does not require that a state choose its legislature through elections, if a state does provide for elections of state officials, it cannot deny participation by charging a poll tax.

There are complicated and subtle reasons why the Warren Court's

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57. See Jamin Raskin & Joan Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

58. 351 U.S. 12 (1956).

59. 383 U.S. 663 (1966).

very best cases—as I would characterize *Griffin* and *Harper*—stopped short of requiring directly as a substantive matter the provision of social benefits such as voting rights or appeal rights. One can imagine the Court concluding that any state government could be constitutionally legitimate only if it was the product of meaningful democratic self-determination, or that a criminal conviction required an appellate opportunity as a matter of constitutional due process.

The fact of the matter is that the Warren Court went right up to the edge of some dramatically new constitutional interpretations, but ultimately pulled back. Perhaps the most vivid example is another case that Raskin's argument deploys, *Shapiro v. Thompson*.<sup>60</sup> In *Shapiro*, the Court struck down state residency prerequisites for the receipt of welfare benefits on the ground that such residency requirements unconstitutionally burdened the right to travel. The case presented the possibility that the Constitution could be read to include a right to minimal income, to welfare benefits themselves. We could imagine the structure of such an opinion basing a right to welfare support on, say, the ability to participate in democratic self-determination, or on the constitutional right to the free exercise of religious belief. You cannot, as a practical matter, participate in the marketplace of ideas, or in the political process, or in religious exercise, if your life is taken up in trying to feed and shelter yourself. Subsistence support, at the very least, might have been recognized as the matrix for the enjoyment of virtually any other constitutional right. Instead, as in *Griffin* and *Harper*, the Court held that, although the Constitution required no welfare program whatsoever, if a state chose to provide welfare, it could not discriminate on the basis of residency.

Why was it that the Warren Court stopped short and declined to recognize an egalitarian based right to participate in the election process through, say, public funding, or a substantively grounded set of prerequisites for criminal convictions, or a subsistence support right? Part of the answer is that the Warren Court was itself constrained by conventional notions that unelected judges lacked the legitimacy to impose dramatic changes in social policy; part of the answer also could be found in the idea that practical enforcement of far-reaching constitutional reform would not have been available.

But my sense is that these frustrating limitations on the reach of Warren Court reform flowed from a real limitation of legal and political vision, an inability to transcend a constrained view of the American Constitution as one guaranteeing negative rather than affirmative

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60. 394 U.S. 618 (1969).

rights, and a widely held belief that, were it otherwise, there would be no limitation to judicial power.

Yet the cases I've alluded to—where the Court came right up to the point of recognizing affirmative rights and seemed to be very close to reading the Constitution as granting effective, real world rights rather than merely formal and negative rights against state action—those cases have never been overruled. They exist as formally good precedent, available to be woven together to construct various formally compelling arguments that seem to require dramatic changes in law. The argument for the recognition of a constitutional right for District residents to vote for representatives in Congress is just such an attempt. If, as Raskin and the Corporation Counsel have done, you put together the one person, one vote principle of *Reynolds v. Sims*<sup>61</sup> together with *Wesberry v. Sanders*<sup>62</sup> and *Evans v. Cornman*,<sup>63</sup> there is a formally correct argument (I think more convincing with respect to the House of Representatives than the Senate) that the current exclusion of District residents from participation in congressional elections is unconstitutional.

So, as a constitutional law "expert," I would say that these are formally compelling legal arguments. Yet, we all have a sense in the room that winning this case would be surprising and unexpected. Again, in a formal legal sense, victory would be surprising because the cases relied on are the most liberal of the Warren Court period—and while they have never been formally reversed, it is clear that, in the current legal climate, they are unlikely to be extended or seen as the basis for the kind of analogical reasoning that Raskin proposes.

There is also a suggestion in Raskin's essay that racism is at work—hostility to District voting rights cannot be separated from the racial composition of the city. Once we begin looking beyond the analytics of the legal arguments to the social and cultural context of the District, however, we are confronted not simply with "racism" as an explanation, but with a much more encompassing situation of "colonialism," a context that, in my view, demands that we evaluate the meaning of "voting" in the wider context of power relations in the city.

What we have in the District of Columbia is a more or less classic case of colonialism, of an old style eighteenth and nineteenth-century colonialism. The biggest mark of that colonialism, the most obvious from our twentieth-century liberal eyes, is the denial of formal self-determination, denial of the formal right to vote. But this is only the

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61. 377 U.S. 533 (1964).

62. 376 U.S. 1 (1964).

63. 398 U.S. 419 (1970).

most formal element of the kind of colonialism that exists in the District of Columbia.

This is like a college town. If you read *The Washington Post* daily, you won't get any sense of the texture of life in the District of Columbia. You'll get a sense of as if it is a college town, and you'll get a sense of what happens at the college. The college is the Federal Government. You could even mistake the fact that Washington, D.C. is a majority black city if you read *The Washington Post*. It doesn't seem to be. All the important news is about what white people are doing.

The other sense of colonization is the sense of disempowerment that partly, I think, comes from a denial of the right to vote. But it is only a small piece of it. Think, for example, of the 1968 riots following the assassination of Dr. Martin Luther King. The late Kwame Ture, formerly known as Stokely Carmichael,<sup>64</sup> led a large group of African-Americans through 14th Street in the former business district before it was burned down in the riots. The first thing that they tried to do early on the first night of the riots upon hearing of King's assassination was to go from store to store—virtually all of the stores were white-owned and white-staffed—asking, "Would you please close down the store?"

This didn't start as destruction, it didn't start as fires, it didn't start as looting. It just started as a request to close down the store. What this episode signifies to me is some attempt to exercise some power in a situation in which you don't have power, that is, some negative sense you have got to close down or we are going to tear the city down, just close down. Close the schools tomorrow, which didn't happen and exacerbated the climate in D.C. the next day. Close down so that we can exercise some power. But the power to close stores and the power to vote doesn't make self-determination.

Think about when Central America was rife with revolutionary energy in the 1970s. The United States, as part of a de-radicalization movement, supported in El Salvador, say, the right wing dictatorship's "land reform." The land reform was in some ways very dramatic: All the big plantations had to be broken down and turned into farmer and worker cooperatives which would then own and work the land.

I think that was just a de-radicalizing measure. It wasn't really a revolutionary thing in El Salvador. But think about Washington, D.C. in these terms. Think about the population density of where African American and Latino people live in Washington, D.C. and where white people live. That is just the density issue. If you look at a map, you

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64. In the 1960's, Stokely Carmichael changed his name to Kwame Ture to signify a newfound freedom. See Omi Leissner, *Naming the Unheard Of*, 15 NAT'L BLACK L.J. 109, 153 (1997-98).

could not help notice all the land that white people have and the limited amount of land that people of color have in D.C.

We need, in addition to the right to vote, land reform. We should just start breaking down those parcels. If you have got a big parcel and people are crowded in another part of the city, well doesn't it seem right as we leave colonization and enter self determination that those pieces of land in Northwest would not be expropriated, as part of a post-colonial reform.

Again, this was a minor reform in El Salvador. It wasn't the radical revolution. It was a minor reform instituted by a right wing government to forestall subversion. In D.C., the colony continues. Therefore, despite the insurrectional riots lasting for four days after the killing of Martin Luther King and led by some of the most gifted leadership that the African American community has ever had, no land reform took place, no material redistribution of wealth took place. No major redistribution of political power, except for the fickle granting of home rule, took place in D.C.

So to sum this up—and I hope I have a little chance to elaborate in a few minutes—I think the voting rights legal argument is right as a constitutional law matter. Yes, it is correct. There should be a right to vote. You can construct an argument out of constitutional precedent that insists that it is correct.

I also think that we all know that this is at least an uphill proposition to get a court to hold this way. Part of the background reason that we know this to be true is that the District of Columbia is in many ways—racial, economic, cultural—a classic kind of colony. When we think of struggling against colonial power, we need to think more broadly than simply the symbolic act of allowing the residents to punch holes in pieces of paper behind a curtain in a privatized and atomized ritual.

After all, as many of us remember, the citizens of South Vietnam, when the United States had an interest in making that country look like a democracy, were marched out of their villages and hamlets under the shadow of bayonets to participate in a ritual of American democracy.

So I want to say that I support this voting rights struggle as a legal matter and as a political matter. I would caution us to keep our eye on the kind of realities of what real redistribution of racial and economic power in a place like the District of Columbia would look like.

PROFESSOR ROSEN: Thanks so much, Professor Peller. Ed Still.

PROFESSOR STILL: Gosh, trying to follow Professor Peller is a tough job. Various images came to mind as he was speaking. I was thinking of Doctor Zhivago coming back to his big house after the revolution and finding that he now only had one room that he shared

with his entire family.

I was thinking, "Well, there is a lot of room in West Virginia, and maybe we could move everybody out of Washington into West Virginia." Then it occurred to me that is what the Khmer Rouge tried to do. Then I remembered that we are here to talk about voting rights in the District of Columbia, and I stopped that reverie. So let me try to get us back down to what I consider to be a practical level about things and talk really about this wonderful phrase "springing constitutional right."

I think that given the text of the Constitution, that Professor Gardner is correct, that these are springing constitutional rights, because I think in many ways that Representative Bingham was right. In the way the Constitution is written, there is no substantive right to vote.

But—and the "buts" are always very important to lawyers—we have reached the practical point that the springing constitutional right (that is, what I would have called an equal protection right to vote) is as good as a substantive right in which the Constitution guaranteed "every person shall have the right to representation." Or as the American Declaration of Rights says: "Every person has the right to self determination and to representation in the national legislature."<sup>65</sup> That is what we are really arguing about.

But let's think about it this way. When the Constitution was written, of course, it is always said that even most white men couldn't vote. There is a paper I picked up at the American Political Science Association meeting a month ago that disputes that, and I have to analyze that argument more thoroughly.

But let's just assume that, that is correct and that women couldn't vote except in New Jersey, and blacks couldn't vote most places. (The vast majority of them couldn't vote because they weren't even considered to be citizens of the United States.) Persons under twenty-one couldn't vote.

So now, what do we have now? We now have a constitutional amendment that says you cannot discriminate against people in the right to vote solely because of race. You can't discriminate on the basis of gender. You can't discriminate on the basis of age if the person is over the age eighteen.

But nevertheless, the original Constitution and the Seventeenth Amendment still say the right to vote for the House of Representatives is dependent upon the suffrage provision of the state for its most numerous legislative branch. The Seventeenth Amendment says the same thing about the right to vote for senators. So textually, there is no

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65. See American Declaration, *supra* note 14.



substantive right to vote.

But given the equal protection branch of Fourteenth Amendment jurisprudence, the diminution of anybody's right to vote can generally be challenged on the basis that there is a denial of equal protection because we have allowed so many other people to vote, either by constitutional amendment or by statutory practice.

For instance, there is a statute in Alabama that was just recently passed that I think inadvertently decreased the number of people who could vote by absentee ballot. It used to say that you had the right to get an absentee—well, they could send you an absentee ballot. You had a right to vote by absentee ballot under, let's say, section one. Under section two, it says, "Here is how we deliver the absentee ballot to you. We will send it to your residence or your usual place of receiving mail, or you can pick it up in person." They just amended the statute to take out the provision about your usual place of receiving mail because they want it to be delivered to your home as a way of an anti-fraud provision.

But doesn't that create two classes of people, one of whom gets mail delivered to their home, and another of whom doesn't get mail delivered to their home? Now those of us who live in urban areas and live on the west side of Rock Creek Park, don't have much problem about getting our mail delivered to us.

But there are places even in this city where people can't reliably receive their mail at their residence address because people come around and steal things out of their mailbox all the time. So they walk down to the post office and get it.

There are small towns in America where people don't get mail delivery as a matter of convenience for the post office because they don't want to hire carriers. Subsequently, we did win this argument, at least in obtaining an injunction under Section Five of the Voting Rights Act.<sup>66</sup> So in that situation, we can make an argument that people who have to receive mail at a post office box or at general delivery have been denied equal protection. That is as good as having a substantive right to vote if we can win with that argument.

In the same way, I think that Raskin's argument is that people in the District of Columbia should have the same right to vote for members of Congress that people in Virginia and Maryland have. It doesn't have to be a substantive right. It just has to be the same as other places and will depend upon those other places as having an expansive right. Similarly, we would make the argument nowadays that people have the, any particular class of people, have the same right to vote as somebody

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66. See *Ward v. Alabama*, 31 F. Supp. 2d 968 (M.D. Ala. 1998) (three-judge court).

else. Since voting is a fundamental right, and strict scrutiny applies, then the government has the responsibility to show that they have some sort of overriding interest that trumps this interest of the citizen in the fundamental right to vote.

The genius of Professor Raskin's argument is that he reminds everyone that those of us who live in the District of Columbia are American citizens, and therefore have the rights of American citizens, even though we may not be residents of Maryland or Virginia, and that one of those rights of American citizenship is the right to be represented in Congress.

So, I would look at it from a very practical standpoint and say that the springing constitutional right is good enough to get us what we want, which is a victory for this lawsuit and particularly, the right to vote for members of Congress, both the House and the Senate, because everybody else in America has that right. Those who do not are non-citizens or those disenfranchised for a criminal conviction.

But fundamentally speaking, we are in the same situation as the vast majority. We have the same American rights as other people do. Therefore, we ought to have the same right to vote that they do. On that very practical basis, I would argue that we do have a constitutional right to vote and to be represented.

Thank you.

PROFESSOR ROSEN: Thank you, Mr. Still. I will complete with Brenda Wright.

MS. WRIGHT: Thank you. So much has been said that is so provocative and insightful. I guess I want to start by going back to Jeff Rosen's description of Congressman Bingham's view of the Privileges and Immunities Clause. I was very struck by it, because as I was preparing for this event, I felt it was necessary to open my old constitutional law textbook and take another look at the *Slaughterhouse Cases*<sup>67</sup> to make sure I really knew what the holding was.

In that textbook, which was Professor Gunther's edition, he describes the observations of someone who participated in those debates. I can't remember the identity of the person right now. He says that the phrase "privileges and immunities" was indeed made up by Congressman Bingham, but that he never explained what he meant by it, and that indeed "its euphony and indefiniteness of meaning were a charm" to Congressman Bingham.<sup>68</sup>

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67. 83 U.S. 36 (16 Wall.) 36 (1872). The *Slaughterhouse Cases* encompass the cases below: (1) *Butcher's Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.* and (2) *Esteban v. Louisiana*.

68. See GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 503 n.\* (9th ed.

I think what is so striking about that—and I just happened to see this in a footnote that Professor Gunther wrote to the *Slaughterhouse Cases*<sup>69</sup>—is that it illustrates for us how constitutional interpretation, the seeds of dispute about the meaning of phrases such as this, are there from the very beginning.

The dispute is not only between the original Framers and those looking at the Constitution from our twentieth-century perspective. The dispute is indeed already there among the participants in the constitutional debate over the Fourteenth Amendment. That has been a hallmark of American constitutional interpretation. Even the authors of the provisions are not always trustworthy and infallible guides to the meaning of these provisions.

Looking at the history of the development of voting rights in American constitutional law, one is struck by the fact that Jeff alluded to, that the status quo that in one generation or in many generations appears to be absolutely inviolable and unchangeable, eventually we find ourselves looking back on those very institutions with incredulity that they ever existed. The poll tax is an example of that.

From the twentieth-century perspective; the late twentieth-century perspective, it appears a laughable anachronism to think that the requirement of paying a poll tax could ever have been a permissible condition for exercising the right to vote. Yet the Supreme Court twice upheld the constitutionality of the poll tax, as Professor Raskin has pointed out in his other articles, before finally striking it down in *Harper v. Virginia State Board of Elections*.<sup>70</sup>

One of the debates that I was reminded of over the poll tax, occurred, I think, in the 1950s. I saw an account of this not too long ago. There was a debate between Claude Pepper, who was arguing against the poll tax, and a defender of the poll tax. This debate is recounted by none other than Daniel Patrick Moynihan, who was there as an observer at the time.

He reported that the individual defending the poll tax pointed out that anyone who really wanted to exercise the right to vote surely could not be deterred by the necessity of paying a dollar, which is all the tax really was in a lot of the states where it existed.

Moynihan recounted that his heart sank when this argument was made because it seemed essentially irrefutable. The idea that having to

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1975) (quoting Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949)).

69. See *id.*

70. 383 U.S. 633 (1966). The Supreme Court had previously upheld the constitutionality of the poll tax in *Breedlove v. Suttles*, 302 U.S. 277 (1937) and *Butler v. Thompson*, 341 U.S. 937 (1951).

pay a dollar would deter anyone who would really want to vote seemed very difficult to defend. But Claude Pepper ambled up to the microphone and said, "Well, a dollar ain't much if you got one."<sup>71</sup>

I think that illustrates how in just a few words a structure that had been accepted up until a particular moment, its very conceptual and moral foundation can crumble by the use of a few well chosen words.

I came across some words that I think have a bearing on this debate that I wanted to bring to your attention as part of this symposium, and they are the words of Abraham Lincoln. In his very brief dictum, he says, "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy."<sup>72</sup>

What do those words mean for the debate we have about the District of Columbia? I don't invoke the notion of slavery just as an exciting rhetorical device. I invoke this phrase because I think it speaks to the fundamental conception we must have about democracy in America.

What it tells us is that democracy is not simply a matter of an individual right, that it is also a matter of the collective relationship of citizens to each other, and that the absence of democracy, the denial of democracy to any one group of citizens within the United States, denies the reality of democracy to the entire citizenry of the United States.

What it means in practical terms is this. I am now a resident of Massachusetts. As a resident of Massachusetts I can vote for my representative to Congress, and that representative then can pass laws and policies which are binding on the people of the District of Columbia, who themselves have no say and can give no consent to those policies.

That relationship places me in what I find to be a morally and politically indefensible position of being, in essence, a master over another group of American citizens who lack the basic rights of citizenship. So this dictum of Abraham Lincoln's reminds us that the denial of suffrage to the residents of the District of Columbia is not merely a denial of their rights, but it is a signal of the failure of American democracy for the entire country.

So I think we almost have to end up redefining the question here. It is not simply whether the Constitution guarantees a right to vote. The question, if you look at it from this perspective, is: Does the American Constitution require in essence the abject failure of democracy?

I think that the entire history of the development of constitutional

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71. The debate is recounted in Todd S. Purdum, *Trying a Constitutional Track to Curb Campaign Spending*, N.Y. TIMES, Oct. 12, 1994, at A28.

72. LINCOLN, *supra* note 10, at 532.

principles in this country tells us that the answer has to be no.

PROFESSOR ROSEN: Thank you very much indeed, Brenda Wright. I was asked to pose a general question to each of our panelists for a brief rebuttal, and then we will open up the discussion to questions.

One thing that struck me in each of the presentations was the tension between the modern notion of the right to vote as a collective right, a right governing the collective relation of citizens to each other, and the nineteenth-century vision of individual rights or privileges or immunities.

The broad question I'd like to pose to each of the panelists is: Can this collective right be comfortably shoe-horned into an Equal Protection Clause that the Supreme Court tells us today is fundamentally individualistic in its concerns?

Isn't this, James Gardner, much of the source of the incoherence of modern voting rights doctrine? Don't we have the worst of both worlds?

You said that the Court has been fundamentally originalist in leaving the states plenary control over the suffrage. But at the same time that they have refused to recognize a fundamental right to vote, haven't they also discovered a color blindness requirement in the *Shaw v. Reno*<sup>73</sup> and *Miller v. Johnson*<sup>74</sup> cases, plucked out of its historical context and superimposed on the collective right to vote, which the Framers never had any intention to regulate in this manner? Haven't the justices, by being bad originalists, given us the worst of both worlds?

Gary Peller talked about the egalitarian right to participate in the political process and presented us with the notion of an effective vote in its most bracing formulation. My question to him is how precisely this could be adjudicated under the individualistic Equal Protection Clause as we understand it today?

What would be the baseline for measuring the source of the egalitarian political power, short of something like proportional representation, which is the baseline that the Court keeps shying away from in its voting rights cases?

And how could our textual Constitution, regardless of the intentions of individual Framers, be reconciled with this bracing vision?

Ed Still talked about the Equal Protection Clause as adequate to guarantee ballot access in an age in which many other groups have been encompassed within the frameworks of suffrage. But I wonder, since he has done such important work in this context, whether he is

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73. 509 U.S. 630 (1993).

74. 515 U.S. 900 (1995).

equally confident that the Equal Protection Clause can comfortably adjudicate vote dilution claims and *Shaw* claims and the range of claims beyond pure ballot access.

I love Brenda Wright's discovery of Congressman George Boutwell. He was a Massachusetts Republican who was a seething rival of Bingham. Boutwell's quotation is often cited by judicial conservatives, most notably Alexander Bickel, who want to argue that the Bill of Rights is not incorporated by the Fourteenth Amendment.<sup>75</sup> They cite his statement to argue that, in fact, we don't really know what privileges or immunities means, so it's best not incorporate.

I wonder, Brenda Wright, whether you think that this collective right of citizens to relate to each other can be comfortably and intelligibly adjudicated within the Equal Protection Clause, or whether we need some sort of new paradigm to sort out analytical confusion of case law.

Let me ask our panelists for brief comments, and then we'll begin questions.

PROFESSOR GARDNER: Well, I forgot my question.

PROFESSOR ROSEN: But that was the point of giving you a long one.

PROFESSOR GARDNER: The question deals with conceiving of voting as a group right rather than as an individual right. Well, in a sense I think that is the wrong question. You know, I would have my law professor membership card revoked if I didn't respond by criticizing the question.

I think the right to vote needs to be looked at in relation to what it is for. Why do we have it? What purpose is it designed to serve? I don't think it is possible to say anything that is inherent in voting as far as its relationship to groups or individuals. It entirely depends why we have a particular regime of voting and what it is supposed to do.

Having said that though, I think that Professor Rosen is right. Part of the confusion is that the Court, by using the Equal Protection Clause, instead of deriving from the structure of the document a substantive right and making it instead a relative right, has put the question in a way that invites comparisons between what one person or one group has and what other individuals or other groups have.

There is only one way to make an equal protection claim, and that is to say that here is something that these other people have, and I don't have it. But that really begs the question whether what the other people have is the right amount of political influence because I take it

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75. See GEORGE S. BOUTWELL, 2 REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 41-42 (1902) (stating that Congressman Bingham arrived at the term "Privileges and Immunities" because of the term's "euphonius and indefiniteness of meaning").

that we have a system of voting for the purpose of instituting a formal system of popular control over government. So yes, I think it is right that the Court has sort of smuggled in this notion of voting as a group right and then is trying to paper over it.

PROFESSOR PELLER: The question about how the court could fashion out of the Equal Protection Clause a collective as opposed to individual rights I think has been answered again by some of the cases of the Warren Court. The Warren Court went pretty far along in demonstrating that it is not inconceivable, it is not crazy, the garbage will still be picked up if you interpret the Constitution according to a real world, realistic, effective notion of what is going on in the world, as opposed to a false, formalistic, individualistic notion.

So the question to me is not so much would it be possible to infuse equal protection with collective norms. Part of the reason for moving in that direction from an analytic and jurisprudential point of view is that there is no way to read the American Constitution to provide any semblance of equality and individual rights. How could it be that there is no right to education, and yet the sense is that we all have a right to compete as individuals in some kind of free marketplace? It doesn't make any sense as an ideological legitimator, and it certainly doesn't make any sense as a practical take on what is going on in American society at the close of the twentieth-century.

The difficulty we are in now is that the Warren Court cases that pointed the way towards an egalitarian, effective vision of democratic self-determination have been repudiated. It is not that they didn't work. It is not that they were bizarre or crazy, you know. They are still in the case books. We still teach them. We just teach them as, well, they have been cabined in this way and curtailed this way.

So what we have here is not a constitution that needs to be read for its inner logic or inner truth or what the Framers really meant. What we have is an ideological struggle over a symbolic chartering document, the American Constitution. The ideological struggle can point with references to precedent that supports this side or that side.

There is left wing support for collective, realistic self-determination and a democracy infused with the empowerment of people from all walks of life. There is clearly precedent for a pinched and narrow view of a kind of democracy that would be a democracy in form only. Ideological struggle will determine which of these—and there are more visions than that—but which vision of the many that are contained in the document and in the precedent, which vision will reign in American constitutional law.

PROFESSOR STILL: This question of the individual right to vote

versus the collective right to vote is one that has come home to Brenda Wright and me and the other people who have worked for the Voting Rights Project of the Lawyers' Committee because we have had to deal with it in the context of cases in which we are trying to empower black and other minority voters.

The Court is taking the position that there is this individual right to vote that is somehow differentiated from a group right to vote. But then you look at the other jurisprudence in relationship to voting in election cases.

The Supreme Court held just about a year ago, a year and a half ago, in the *Timmons v. Twin Cities Area New Party*<sup>76</sup> case that Minnesota could ban fusion candidates. One of the reasons they gave for that was because they wanted to preserve the two party system, the vitality of the two parties. Similarly, in the *Burdick v. Takushi*<sup>77</sup> case, the Hawaii case involving the ban on write-in votes, the effect of that was to put an emphasis on getting a party nomination or going through the process and getting an independent ballot slot by petition or some other method.

So the point of both of those, however, is that they respect the idea that there will be collective action by people who call themselves a political party. Similarly, in *Shaw v. Reno*<sup>78</sup> and the other cases, since then, *United States v. Hays*,<sup>79</sup> *Miller v. Johnson*,<sup>80</sup> *Shaw v. Hunt*,<sup>81</sup> *Bush v. Vera*,<sup>82</sup> they do not ever identify an individual right that has been violated in some way, that is, in the sense that there is an individual harm to a person. How was Ms. Shaw harmed?

She never did explain that being in Mel Watts' district versus somebody else's district harmed her in some way. She was not required to prove that in any way. So the Court said that she was really talking about an expressive harm, which I think is just another way of talking about a group right.

So apparently Republicans, Democrats, and white people have group rights; black people have individual rights, according to the jurisprudence of the Supreme Court, which I think just shows you some of the results-oriented reasoning you get in these various cases from the Supreme Court.

MS. WRIGHT: I think the question to me was do we need a

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76. 520 U.S. 351 (1997).

77. 504 U.S. 428 (1992).

78. 509 U.S. 630 (1993).

79. 515 U.S. 737 (1995).

80. 515 U.S. 900 (1995).

81. 517 U.S. 899 (1996).

82. 517 U.S. 952 (1996).



paradigm other than the Fourteenth Amendment, or is the Fourteenth Amendment adequate to the task at hand. I think I lean with those who say that the Fourteenth Amendment is more than adequate, had the Court not made some fundamental mistakes in its interpretation of several of its provisions, including that of the Privileges and Immunities Clause.

I guess I just want to recommend to everyone here on that question a wonderful book by Professor Charles Black called *A New Birth of Freedom: Human Rights Named and Unnamed*.<sup>83</sup> He just published it last year, I believe. It is the best exposition that I know of the Supreme Court's gross historical mistake in interpreting the Privileges and Immunities Clause of the Fourteenth Amendment to have essentially no content, as well as in interpreting the Ninth Amendment, which says that enumeration of certain rights in the Constitution shall not be deemed to deny or disparage other rights retained by the people.

If you want to see an elegant, beautifully constructed, logical, rational argument as to the historical mistake made by the Supreme Court in the *Slaughterhouse Cases*<sup>84</sup> and in other cases, I highly recommend that book to you. I think it, along with works such as Professor Raskin's, illustrates that the Fourteenth Amendment is adequate to the task at hand. The question is whether our political and judicial institutions are adequate to the task at hand.

PROFESSOR ROSEN: Thanks so much. We got a late start, so I think we have just under ten minutes for questions, and I would like to invite them now. Sir.

AUDIENCE MEMBER: Hello. Can you hear me?

PROFESSOR ROSEN: Yes, indeed.

AUDIENCE MEMBER: I am Larry Morel with the Committee for the Capital City. I agree with Professor Still that procedural due process is enough to win this case. I think that this legal challenge has a real possibility to win on procedural grounds of equal protection.

But I wanted to ask the panel if they would address what I think is the strongest argument of all, and that is the second half of Clause Seventeen of Section Eight of the first article of the Constitution, which has to do with the federal enclaves.

That provision says that like authority—Congress shall exercise like authority over the federal enclaves as it exercises over the District of Columbia.<sup>85</sup> The courts have held and Congress has enacted laws giving

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83. CHARLES L. BLACK, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED* (1997).

84. 86 U.S. 36 (16 Wall.) 36 (1872).

85. See U.S. CONST. art. I, § 8, cl. 17 ("[T]o exercise like Authority over all Places purchased by

the right of people living in the federal enclaves—that is what the *Evans v. Cornman* case<sup>86</sup> was all about—to vote in the states in which those enclaves were located.

I would like to ask the panel to address what they see here in that clause for an equal protections argument.

PROFESSOR STILL: Well, let me speak to that because that was an issue that I have looked at some. Clause Seventeen says Congress has “exclusive jurisdiction” over the District of Columbia and over “all places purchased . . . for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.”<sup>87</sup> Under that provision, the people who live at the National Institutes of Health in Bethesda, who were not allowed to vote by Montgomery County, brought *Evans*, and the Supreme Court held they were entitled to register and vote in Maryland. Similarly, people who happen to live on the premises of Andrews Air Force Base are allowed to vote in Maryland as well.

I can't see a distinction between—well, there are some distinctions, but I will choose not to see them—between the National Institutes of Health and the District of Columbia. One distinction could be made that the District of Columbia is so large that it actually has a local government. Well, since we don't have much of a local government at the moment, maybe we are more like the National Institutes of Health.

I would have used the *Evans v. Cornman* argument if I were seeking to have the District of Columbia residents be allowed to vote in Maryland, specifically because I think that we need that group right of being able to vote collectively and to take care of the special interest that we have.

But I will turn the special status of the District around and say it is because of that special status of the District that we should be allowed to vote for a member of Congress on our own, not as part of Maryland, and for senators on our own, and not as part of Maryland.

PROFESSOR ROSEN: Any other questions? We'll catch somebody over there.

AUDIENCE MEMBER: I am Anne Leiko, and I have more of a comment than a question. I guess it is Professor Peller's comments about the colonial status of the District of Columbia, which I agree with immeasurably.

I do think though that it is distorting the whole argument to cast it in racial terms. For all of us in this room who are at least forty years of age, the majority African American status of the city has only come in our

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the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]”.

86. See 398 U.S. 419 (1970).

87. U.S. CONST. art. I, § 8, cl. 17.

lifetime.

I have at home a picture of my great grandfather in 1881 showing Pennsylvania Avenue flooded, and he is standing in a boat in front of it decrying the state of the District of Columbia after Congress has revoked at that point the territorial government and is ruling the city, and our lack of representation and what it has done to the city.

So I think the status of the citizens of the District of Columbia go to whatever they are. Its racial composition and ethnic composition has changed over time, and is still changing. The fundamental unfairness of us not having a right to vote, both locally and nationally, has been the same for almost 200 years.

So the fact that there is a racial element for some members of Congress or some in the population who think that that justifies anything is, I think, more a smokescreen for what the fundamental problems are of lack of representation for all citizens, whoever they are.

PROFESSOR PELLER: I appreciate that the lack of formal voting representation preceded the racial status of the District. But respectfully, I would—I believe that the reason that the status has not been cured has a lot to do with the racial and class perception of the District by everybody in the Congress and the rest of the country.

So I hear what you are saying. I disagree though. I think that if the District were a relatively wealthy, upper middle class, white territory that a lot of things would be different, and probably voting is one of them.

PROFESSOR ROSEN: Are there any more questions? Yes.

AUDIENCE MEMBER: But based on history though, doesn't it show that regardless of the races that were prominent, that we did not have a fair recognition from Congress? They would have to do so many things that were showing that they were taking the inalienable rights of the citizens, be they white or what, males, and shoving them aside and not allowing due process to go on.

PROFESSOR PELLER: I think you all are making a very similar point. I agree that the right to vote has been denied on a very fair and integrated basis. I guess that is the way to say it.

PROFESSOR ROSEN: Sir, Mr. Plotkin.

MR. PLOTKIN: My name is Mark Plotkin. I would like to ask Professor Gardner, because you in some way prepared us for a decision that would be—did you call it or did Professor Peller call it a loser?

PROFESSOR PELLER: I said an uphill struggle. That was deleted from the proceedings.

MR. PLOTKIN: I want to brace myself for this horrible decision written by the Supreme Court. You are all law professors and learned men. Write that decision and give me the legal reasoning that—excuse

me, Mr. Gardner, that you said stinks—that you could write the decision, that we will have another panel discussion talking about a horrible Supreme Court decision because I would like to hear—I really mean this—creatively and supposedly legally how they could justify a ruling against this case.

PROFESSOR GARDNER: Well, I can't—

MR. PLOTKIN: Be Justice Rehnquist.

PROFESSOR GARDNER: Oh, no, please. Actually, before I started teaching, I was a litigator with the Justice Department Civil Division in the branch that is probably going to be defending this suit. So I could tell you how I would write the brief opposing it. I guess the whole thing turns in that sense on one word in the Constitution. It is the word "State." Article I, Section Two, and Article I, Section Three say that members of Congress shall be elected by the people of the "states." The District is not a "state." End of argument.

Now, you know—

PROFESSOR STILL: Is your brief going to be that short?

PROFESSOR GARDNER: Yeah. It depends very much—to make that kind of argument and make it stick, you really have to play up text. You have to say: listen, the way you decide these cases is text. You can look at other stuff in some kinds of situations where the text isn't clear. But here the text is unmistakably clear, and just don't look beyond it. That to me is where the case stands or falls.

PROFESSOR ROSEN: Last question, Professor Gillette.

PROFESSOR GILLETTE: I was a little hesitant to speak again. But I think Mr. Peller and Ms. Wright have provided the proper juxtaposition of the discourse that I was seeking. This is part of a discourse that I think is terribly necessary. If we take Professor Peller's question, what difference will the vote mean anyway, I agree totally that the vote in itself cannot transform the District of Columbia's status.

If we take that position as a relatively narrow issue, I think we are really cornered in a situation where we will not have a proper resolution. What I see as a breakthrough this morning in terms of conceptualizing this, in the bold and powerful statement from Ms. Wright, is that this is not an issue that we ask in isolation in the District of Columbia, but of the whole United States.

If you think about it in the most practical terms—and I have had speakers in my classes who have actually defended the position which seems to me extraordinarily narrow—that there should be no commuter tax in the District of Columbia because the Congress says that shall be so.

So, if you really want to get down to it, two states, Maryland and

Virginia, are holding up the entire United States Congress from making a simple change in the way in which Congress oversees this colonial territory, which might give the District of Columbia a greater position of financial security.

That position can be maintained because the country is not yet thinking of itself in a master relationship, as Ms. Wright has said, to say this is wrong. Instead, it is allowing two states to hold up the rest of the Congress in the exercise of a basic right of taxation.

I would hope very strongly that we would move towards embracing Ms. Wright's position and see this not as the District of Columbia solely seeking its rights, but seeing how the failure to achieve these rights is really diminishing the whole country.

I really want to commend her statement. I think it is extraordinarily important.

PROFESSOR ROSEN: Why don't we give the last word to Brenda Wright.

MS. WRIGHT: Well, I think that my reason for bringing forward the observation of Abraham Lincoln about the meaning of democracy is simply to recognize that the history of constitutional reform litigation in this country has always, for its success, depended on a core of moral rightness to the cause being represented in that constitutional litigation.

It has depended on the entire country becoming aware of the necessity of that reform to its own moral authority, just as watching the pictures of the protestors in Alabama being bombarded by fire hoses woke up the country to the immorality of Jim Crow.

We have the necessity, that probably has not been met yet, of awakening the country to the injustice of the current arrangements. I think that one of the pieces of work that is unfinished here is articulating and making the rest of the country understand its stake in this battle on behalf of the District's residents.

PROFESSOR ROSEN: Thank you so much, Brenda Wright. Thank you all for a fascinating and useful panel. Please join me in thanking our panelists.

HOST: Ladies and gentlemen, we will take a short break while we prepare for the debate, and meet back in here in about ten minutes.